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Supreme Court, U.S.
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No. 95-1951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

ALBERT JOHNSON,

Petitioner,

v.

MICHAEL SHEAHAN, JAMES FAIRMAN, and RAUL ESTRADA,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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REASONS WHY *CERTIORARI* SHOULD BE DENIED

I.

NO TRUE CONFLICT EXISTS AMONG THE COURT OF APPEALS AS TO WHETHER THE PERIODIC VIEWING OF INMATES IN VARIOUS STATES OF UNDRESS BY PRISON GUARDS OF THE OPPOSITE SEX IN THE COURSE OF ROUTINE SUPERVISION VIOLATES THE FOURTH OR EIGHTH AMENDMENT.

Petitioner asserts that the Seventh Circuit's ruling in this case is "sharply in conflict" with decisions in the First, Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits, and that the Seventh Circuit "stands alone" in holding that prison inmates do not possess a constitutional right not to be seen in the nude by the other sex. Petitioner overstates the scope of the holdings in the other circuits as well as the holding of the Seventh Circuit in this case in detailing this supposed conflict. A review of the cases cited by plaintiff in conjunction with the Seventh Circuit's opinion reveals that no such deep, one-sided conflict exists. Indeed, the Seventh Circuit's opinion in this case is fully supported by the holdings of this Court in *Hudson v. Palmer*, 468 U.S. 517 (1984), *Bell v. Wolfish*, 441 U.S. 520 (1979), and *Turner v. Safley*, 482 U.S. 78 (1987), and is consistent with the holdings of most of the cases cited by petitioner.

The Seventh Circuit in the instant case upheld the district court's dismissal of petitioner's pro se § 1983 complaint after considering his claim that cross-sex monitoring at the Cook County jail violated his rights under the constitution in the context of the fourth amendment's prohibition against unreasonable searches, the fifth amendment's due process clause and the eighth amend-

ment's protection against cruel and unusual punishment. The Seventh Circuit found that in light of this court's opinions in *Wolfish* and *Hudson*, a prisoner's right to privacy under the fourth amendment is extinguished upon being committed to prison. (See, Arg. II A, *supra* for further discussion.) In terms of the fifth amendment due process clause, the Seventh Circuit noted the question was whether the regulation is "reasonably related to legitimate penological interests," citing *Turner v. Safley*, 482 U.S. at 89. The court, noting that surveillance of prisoners was essential and that observation of cells, showers, and toilets was less intrusive than the body-cavity inspections permissible under *Wolfish*, deferred to the judgement of prison administrators in permitting cross-sex monitoring. Finally, the Seventh Circuit considered petitioner's claim in light of the eighth amendment. The court observed that this amendment offered some protection supplementary to the fourth and could be invoked to overcome "calculated harassment unrelated to prison needs," citing *Hudson*, 468 U.S. at 530. The court further noted that petitioner's complaint did not allege either particular susceptibility or any design to inflict psychological injury, or deliberate harassment on account of sex. The Seventh Circuit reasoned that since petitioner failed to allege the intent necessary to satisfy the mental state component of the eighth amendment under *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), and since cross-sex monitoring could not be called "inhumane" and therefore did not fall below the floor set by the objective component of the eighth amendment, the district court properly dismissed petitioner's complaint for failure to state a claim upon which relief could be granted. (For further discussion of the Seventh's Circuit's eighth amendment analysis, see Arg. II B.)

Without stating the grounds upon which the rulings were based, or any discussion of the facts of the cases he cites, petitioner asserts that "the First, Second, Fourth, Sixth, Ninth, Tenth, and Eleventh Circuits have all recognized that routine cross-gender viewing of naked, showering, defecating, or urinating prisoners triggers constitutional scrutiny." (Pet. Br. 11) Standing alone, this statement means very little—the Seventh Circuit in the instant case "scrutinized" petitioner's claim in light of three separate amendments to the constitution. Petitioner goes on to cite language from opinions from each of these circuits which may misleadingly suggest that all these circuits have squarely addressed the issue facing the Seventh Circuit in this case and have held precisely the opposite. A review of these cases establishes this is not at all the case. Many of the cases cited by petitioner concern strip searches, not routine surveillance of the prison facility as in the instant case, and in other instances, some of the language quoted is merely dicta and other language supports the Seventh Circuit's opinion in this case.[1] Further, the Seventh Circuit's prior holding in

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[1] In *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991) the court did not reach the issue of the constitutionality of a visual strip search conducted upon a male inmate, which was observed by a female corrections officer in a supervisory capacity from a distance of five feet, in ruling that defendants were entitled to qualified immunity. The court, supporting the Seventh Circuit's opinion in this case, noted that "even assuming such a protected right, inadvertent and occasional observations restricted by distance, of inmates' dressing, showering, being strip searched or using toilet facilities do not rise to the level of constitutional infringement." 945 F.2d at 41. In *Forts v. Ward*, 621 F.2d 1210 (2d Cir. 1980), the state defendant did not challenge the district court's order prohibiting the assign-

(continued...)

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994), is consistent with its holding in the instant case, contrary to petitioner's claims. (Pet. Br. 12, n. 3)[2]

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[1] (...continued)
ment of male guards to night time viewing of female inmates through cell door windows, and the Second Circuit considered only the issue of whether the remedy infringed upon the guards' right to equal employment opportunities. In *Strickler v. Waters*, 989 F.2d 1375 (4th Cir. 1993), the court ruled that a male inmate's constitutional rights were not violated by being exposed to female officers patrolling the cell block and in the "back office area" where prisoners showered, are strip searched and use the toilet. The court noted that curtains concealed the male prisoners while they showered (just as in the instant case) and that a counter in the back room obscured the female officer's view. In *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992), the court considered the propriety of a strip search conducted before several female officers, reversed the judgment in favor of the inmate on his fourth amendment claim and remanded for a new trial. In *Michenfelder v. Sumner*, 860 F.2d 328 (9th Cir. 1988), the court ruled that the fact that female correctional officers might be able to view strip searches of male prisoners did not render the search unconstitutional. In *Cumbey v. Meachum*, 684 F.2d 712 (11th Cir. 1982), the court held the district court erred in dismissing inmate plaintiff's entire action as frivolous, where he alleged in his pro se complaint that male inmates while completely or partially unclothed are being subjected to "a certain amount of viewing" by female correctional officers. *Harding v. Stynchcomb*, 691 F.2d 1364, 1374 (11th Cir. 1982), is an employment discrimination case, in which the court held that the bona fide occupational qualification (bfoq) exception to Title VII did not justify defendants' arbitrary practice of funneling deputy sheriffs through positions reserved almost exclusively for males.

[2] In *Canedy*, the Seventh Circuit held that a right of privacy limits the ability of wardens to subject men to body searches by women, or the reverse. (See Pet. App. 2a) In its opinion in the instant case, the court specifically designated the language cited by petitioner in his footnote as dictum, stating the fol-
(continued...)

Petitioner concedes that the courts of appeal differ as to the source of prisoners' constitutional interests in avoiding cross gender surveillance. Respondent submits that the Seventh Circuit properly placed the source of a prisoner's "privacy" interest in the eighth amendment, and the Seventh Circuit's view is supported by decisions of other circuits as well as the opinions of this court. Certainly contrary to petitioner's claim, the Seventh Circuit does not stand alone against the majority of other circuits in this regard.

Petitioner claims "some" courts of appeals have recognized a "fourth amendment privacy interest in not being routinely monitored in intimate circumstances by guards of the opposite sex, infringement of which triggers a factual inquiry into the reasonableness of the practice," citing *Kent v. Johnson*, 821 F.2d 1220 (6th Cir. 1987); *Michenfelder v. Sumner*, 860 F.2d 328 (4th Cir. 1988), and *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991). An examination of these cases however, reveals that none of them support the broad rule put forth by petitioner here.

In *Kent*, plaintiff's complaint alleged first, fourth and eighth amendment violations stemming from prison authorities' practice of allowing female prison guards unrestricted access to the male housing unit. Plaintiff asserted that one of the fundamental tenets of his Christianity was modesty, which was violated when female guards were permitted and required to observe him per-

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[2] (...continued)
lowing: "To the extent incautious language in *Canedy* implies that deliberate visual inspections are indistinguishable from physical palpitations its discussion is dictum. Further reflection leads us to conclude that it should not be converted to a holding." (Pet. App. 7a)

forming necessary bodily functions in his cell and while showering, and that when plaintiff asserted his right to privacy, female prison guards "allowed themselves unrestricted views of his naked body in the shower, at close range and for extended periods of time, to retaliate against, punish and harass him for asserting his right to privacy." 821 F. 2d at 1224, 1227-1228. The court ruled that the district court erred in dismissing plaintiff's claims based on the first, fourth and eighth amendments, stating specifically in regard to his fourth amendment claim:

> Thus, assuming that there is some vestige of the right to privacy retained by state prisoners and that this right protects them from being forced unnecessarily to expose their bodies to guards of the opposite sex, the instant complaint did state a constitutional claim upon which relief can be granted. 821 F.2d at 1227.

This language, especially when viewed in light of the facts alleged in the complaint in *Kent*, hardly supports the broad rule advocated by petitioner here.

Michenfelder, also relied upon by petitioner to establish support for his proposed rule, similarly falls short. In that case, as noted in footnote 1, *supra*, the court ruled that the fact that female officers can observe strip searches, and are sometimes employed for shower duty, did not violate male inmates' right to privacy. 860 F.2d at 333-334. Further, the court in *Michenfelder* never designated this right of privacy as flowing from the fourth amendment. See, 860 F.2d at 333-334. Indeed, the Ninth Circuit cited its prior opinion in *Grummett v. Rushen*, 779 F.2d 491, 493-495 (9th Cir. 1991), which analyzed an inmate's right to privacy based on the four-

teenth amendment due process clause. The *Michenfelder* court did employ *Turner v. Safley's* rational relationship test in determining that the prison's allocation of responsibilities represented a reasonable attempt to accommodate prisoner's privacy concerns consistent with internal security needs and equal employment concerns. 860 F.2d at 334. Likewise, the Seventh Circuit in the instant case employed the *Turner v. Safley* test in the context of its analysis under the fifth amendment due process clause, as well as in its eighth amendment analysis. (Pet. App. 4a, 8a) Thus, rather than supporting petitioner's claim, *Michenfelder* supports the opinion of the Seventh Circuit in this case.

Finally, *Cookish v. Powell*, 945 F.2d 441 (1st Cir. 1991), does not support petitioner's claim that he possesses a fourth amendment right of privacy which protects him from cross-sex monitoring. In summarizing "the state of relevant law" at the time of its decision, the *Cookish* court stated "inadvertent, occasional, casual, and/or restricted observations of an inmate's naked body by a guard of the opposite sex did not violate the fourth amendment," again as noted in footnote 1, *supra*. (945 F.2d at 44). The court, which never reached the issue of the constitutionality of female officers observing a strip search of a male inmate from a distance of five feet, also cited language from *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1995), indicating "casual observations restricted by distance, of inmates dressing showering, being strip searched or using toilet facilities do not rise to the level of constitutional infringement." 945 F.2d at 447. Again, rather than supporting petitioner's claim that the Seventh Circuit stands alone, *Cookish* provides further support for its opinion in this case.

To support his contention that the Seventh Circuit stands alone against other circuits in its determination that the cross-sex monitoring alleged in his complaint did not violate the constitutional "right to privacy", petitioner again cites a series of cases which are either inapplicable, or actually provide some support for the Seventh Circuit's opinion. (Pet. Br. at 14).[3]

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[3] *Lee v. Bratten*, 1994 U.S. App. LEXIS 20669 (4th Cir. Aug. 8, 1994) is an unpublished opinion based on a complaint alleging that a female officer observed a male inmate as he was strip searched. The court did note that the right to privacy was implicated, but did not attribute that right to any specific amendment and did not rule that any right to privacy was violated, but rather remanded the case to the district court with instructions to comply with procedural requirements. *Strickler v. Waters*, 989 F.2d 1374 (4th Cir. 1993), and *Cumbey v. Meachum* 684 F.2d 712 (10th Cir. 1982), have been discussed and distinguished in footnote 1, *supra*. As noted, the factual situation in *Strickler* and the court's language in that case support the position of the Seventh Circuit here. In *Lee v. Downs*, 641 F.2d 1117, 1119-1120 (4th Cir. 1981), the court ruled that a female inmate's right to privacy was invaded when her clothing was forcibly removed in the presence of male guards, despite her expressed willingness to remove her clothing voluntarily if the male guards would withdraw. In *Fortner v. Thomas*, 983 F.2d 1024, 1030 (11th Cir. 1993), the court recognized that prison inmates retain "a constitutional right of privacy" and remanded the case to the district court to apply the *Turner* "reasonableness" test in determining whether injunctive relief was appropriate for the alleged infringement of the appellants' constitutional rights to bodily privacy, consistent with what the Seventh Circuit did in the instant case. *Smith v. Fairman*, 678 F.2d 52 (7th Cir. 1982), is a prior opinion of the Seventh Circuit, in which the court upheld cross-sex pat-down searches of prison inmates while recognizing that the inmates possess a limited right to personal privacy, and was cited by the Seventh Circuit in its opinion in the instant case. (Pet. App. 4a)

Petitioner's attempt to depict the Seventh Circuit as standing alone in its analysis of petitioner's claim with regard to the eighth amendment is equally flawed. Although petitioner cites *Jordan v. Gardner*, 986 F.2d 1521 (9th Cir. 1993), for the proposition that "at least one court of appeals explicitly disagrees with the Seventh Circuits majority's position," an examination of *Jordan* reveals that once again petitioner is overstating the holding in the case. The Seventh Circuit in the instant case actually cites *Jordan* to support its view that the references to privacy in its previous opinion in *Canedy v. Boardman*, 16 F.3d 183 (7th Cir. 1994), and similar cases, should be understood as invocations of the eighth amendment's ban on cruel and unusual punishments. (Pet. App. 5a) *Jordan* is factually distinguishable from the case under review in that it does not concern female correctional officers monitoring of male prison facilities, but rather male correctional officers conducting pat-down body searches of female inmates. The court in *Jordan* concluded that the record supported the postulate that women experience unwanted intimate touching by men differently from men subject to comparable touching by women and ruled that the policy to allow such searches constituted an "infliction of pain," in violation of the eighth amendment. 986 F.2d at 1526.

The *Jordan* court's ruling simply cannot be construed as "explicitly" disagreeing with the Seventh Circuit's opinion in the instant case. Like the court did in *Jordan*, and as urged by petitioner here, the Seventh Circuit considered whether the policy of permitting cross-gender surveillance was reasonably related to legitimate penological interests under *Turner*, in finding no violation of the eighth amendment's ban on cruel and unusual punishment. (Pet. App. 4a, 8a, 12a).

The Seventh Circuit's opinion in this regard is fully supported by the opinion of the Eighth Circuit in *Timm v. Gunter*, 917 F.2d 1093, 1102 (8th Cir. 1990), which concluded that "opposite sex surveillance of male inmates, performed on the same basis as same-sex surveillance," is constitutionally permissible. The Seventh Circuit cited *Timm* in support of its opinion in the instant case, and noted that the petitioner's factual allegations presented "exactly the same situation the eighth circuit held permissible in *Timm*." (Pet. App. 6a, 8a) The Seventh Circuit also noted that the Ninth Circuit held cross-sex monitoring to be constitutional in *Grummett v. Rushen*, 779 F.2d 491 (9th Cir. 1985).

Thus, it is evident that the Seventh Circuit's opinion in the instant case is fully supported by and consistent with the opinions of the majority of other circuits. There is no direct circuit split on a recurring constitutional issue, contrary to petitioner's claims. Further, there is no disparity in treatment among the circuits, again contrary to petitioner's claims. The various circuits of appeals, including the Seventh Circuit, are consistently considering the issue of cross-sex monitoring in accordance with this Court's opinions in *Wolfish*, *Hudson*, and *Turner*.

II.

THE SEVENTH CIRCUIT'S DECISION CORRECTLY APPLIED THE LAW UNDER THE FOURTH AND EIGHTH AMENDMENT.

Although the Seventh Circuit analyzed petitioner's claims under the fourth amendment's prohibition against unreasonable searches, the fifth amendment's due process clause and the eighth amendment's ban on cruel and unusual punishments, petitioner attacks only the court's

reasoning in connection with the fourth and eighth amendments. Thus petitioner is in apparent agreement with the Seventh Circuit's view that under *Turner v. Safley*, the cross-sex monitoring policy at issue here is reasonably related to legitimate penological interests. (Pet. App. 4a.) In any event, respondent submits the Seventh Circuit's analysis under the fourth and eighth amendments is equally sound.

A. The Seventh Circuit Properly Relied Upon *Wolfish* and *Hudson* To Dismiss Petitioner's Privacy Claim Under The Fourth Amendment.

Petitioner argues that the Seventh Circuit misread this Court's opinions in *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Bell v. Wolfish*, 441 U.S. 520 (1979), in concluding that the fourth amendment right to privacy was extinguished upon being committed to prison. However, it is petitioner, not the Seventh Circuit who misreads *Hudson*, when he cites *Hudson* for the proposition that "[p]risoners continue to enjoy Fourth Amendment protections that are not fundamentally inconsistent with imprisonment itself or incompatible with the objectives of incarceration," (Pet. Br. 18) and when he attempts to limit the applicability of *Hudson* to searches of an inmate's possessions in his cell.

An examination of *Hudson* reveals that nowhere in that opinion did this Court state that prisoners were still entitled to fourth amendment protections after their entry into prison. Further, this Court's holding that prisoners had no reasonable expectation of privacy in their cells was not limited to their possessions within the cell, as petitioner now asserts. This Court ruled as follows:

> [W]e hold that society is not prepared to recognize as legitimate any subjective expectation of privacy that a prisoner might have in his prison cell and that, accordingly, the Fourth Amendment proscription against unreasonable searches does not apply within the confines of the prison cell. The recognition of privacy rights for prisoners in their individual cells simply cannot be reconciled with the concept of incarceration and the needs and objectives of penal institutions. 468 U.S. at 526

This language is broad in scope and applies to the incidental viewing of a naked prisoner in his cell as well as his possessions, as correctly found by the Seventh Circuit in this case.

This reading of *Hudson* is supported by this Court's opinion in *Bell v. Wolfish*, 441 U.S. 557 (1979), where visual body cavity searches were upheld against a fourth amendment challenge. For the purposes of that opinion, decided prior to *Hudson*, this Court assumed that both convicted prisoners and pretrial detainees retained some Fourth Amendment rights upon commitment to a corrections facility, but found that the searches were reasonable and did not violate the amendment. 441 U.S. at 558-559. The visual monitoring of naked prisoners in their prison cells and shower area, considered by the Seventh Circuit in the instant case, represents a less intrusive search than the body cavity search approved by this Court in *Wolfish*.

Petitioner again asserts that other courts of appeals "consistently limit *Hudson* to cell searches and hold that surveillance and other searches of prisoner's bodies are properly subjected to fourth amendment scrutiny." Three of the cases he cites to support this statement, *Cornwell v. Dahlberg*, 963 F.2d 912 (6th Cir. 1992), *Kent*, and

Michenfelder, have been discussed in Argument I, *supra*, n.1. As noted above, none of those cases find a fourth amendment protection against cross-sex monitoring of prisoners in various states of undress, and *Michenfelder* and *Cookish* actually support the Seventh Circuit's opinion in the instant case. *Covino v. Patrissi*, 967 F.2d 73 (2nd Cir. 1992), the only other case cited by petitioner to support this proposition, concerned visual body cavity searches, not cross-sex monitoring of prison facilities, as in the instant case. In *Covino*, the court did recognize that inmates do retain a limited right to bodily privacy, and applied the *Turner* factors in determining that the random visual body-cavity search policy was not an unreasonably regulation. Similarly in the instant case, the Seventh Circuit employed the *Turner* analysis of the cross-sex monitoring policy and the fifth amendment due process clause. (Pet. App. 4a.) The Seventh Circuit properly relied upon *Hudson* and *Wolfish* in ruling that no fourth amendment right of privacy was implicated by the cross-sex monitoring policy employed by prison officials in the instant case. Further, no other court of appeals has found such a fourth amendment right, contrary to petitioner's claims.

B. The Seventh Circuit's Ruling That Cook County Jail's Cross-Sex Monitoring Policy Does Not Violate The Eighth Amendment's Ban On Cruel And Unusual Punishment Is Fully In Accordance With This Court's Rulings And Those Of Other Courts Of Appeal.

Petitioner contends that the Seventh Circuit erroneously concluded that because petitioner did not allege that prison officials had any intent to injure in adopting the policy allowing cross-sex monitoring of prisoners in vari-

ous states of undress within the prison facility, the policy did not violate the eighth amendment. Petitioner adopts the view of Judge Posner in his dissent in this case, that it is sufficient to show "deliberate adoption" of a practice that "constitutes cruel and unusual punishment," and compares the cross-sex monitoring policy in the instant case to the disciplinary use of "the thumbscrew and rack." (Pet. Br. 20)

Petitioner's (and Judge Posner's) comparison is spurious. The Seventh Circuit correctly noted that the policy of permitting cross-sex monitoring "cannot be called inhumane and therefore does not fall below the floor set by the objective component of the eighth amendment." (Pet. App. 12a) The court noted several settings in which persons of one sex may observe persons of the other sex in the nude, and stated, "[h]ow odd it could be to find in the eighth amendment a right not to be seen by the other sex." (Pet. App. 7a) Certainly, the Seventh Circuit would not make the same statement about the use of the thumbscrew and rack.

The Seventh Circuit properly relied upon this Court's precedents in *Whitley v. Albers*, 475 U.S. 312 (1986), *Wilson v. Seiter*, 501 U.S. 294 (1991), and *Farmer v. Brennan*, 114 S.Ct. 1970 (1994), in ruling that since petitioner did not allege either a particular susceptibility or any design to inflict psychological injury, he could not satisfy the demanding mental state component of the eighth amendment. (Pet. App. 5a-8a) Petitioner did not discuss the holdings of either *Whitley* or *Wilson* and does not even cite *Farmer v. Brennan*, which the Seventh Circuit relied upon as holding that the mental state component of the eighth amendment is criminal recklessness. Relying on these precedents, the Seventh Circuit noted

that to satisfy this standard, the guard or warden must want to injure the prisoner or must know of and disregard a substantial risk that harm will befall the prisoner, and the petitioner did not make any such allegations in his complaint. (Pet. App. 8a.)

Jordan v. Gardner, 986 F.2d 1521 (9th Cir. 1993), cited by petitioner to support his view that the cross-sex monitoring in the instant case violated the eighth amendment, is factually distinguishable and indeed illustrative of the type of allegation that must be made to satisfy the mental-state component of the eighth amendment. In *Jordan*, there was evidence and allegations of deliberate indifference, and serious psychological pain,[4] stemming from the policy of allowing male guards to conduct forced body searches upon female inmates who had been victims of sexual abuse, and who stated their willingness to be searched by guards of the same sex. No such allegations were made by petitioner here and the Seventh Circuit correctly ruled that absent such allegations, the district court properly dismissed petitioner's complaint for failure to state a cause of action under the eighth amendment.

The Seventh Circuit in the instant case properly determined that petitioner failed to state a claim under the fourth, fifth or eighth amendments. Its ruling is fully supported by this Court's precedents and is not in conflict with the majority of the other circuit courts of

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[4] Under the recently enacted Prison Litigation Reform Act, 42 U.S.C. § 1997e(e) a prisoner may not bring a federal civil injury for mental or emotional injury suffered in custody without a prior showing of physical injury, an allegation not made in *Jordan*.

appeal, as erroneously contended by petitioner. Rather, an examination of the cases cited by petitioner reveals that in most instances, the rationale of the other courts of appeals is consistent with that of the Seventh Circuit in this case. There is no merit to any of petitioner's claims.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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